Foreword

The historic International Law Studies ("Blue Book") series was initiated by the Naval War College in 1901 to publish essays, treatises and articles that contribute to the broader understanding of international law. This, the eighty-eighth volume of the "Blue Book" series, is a compilation of scholarly papers and remarks derived from the proceedings of a conference hosted at the Naval War College on June 21–23, 2011 entitled "Non-International Armed Conflict in the 21st Century."

The purpose of the June 2011 International Law Conference was to examine the legal issues surrounding non-international armed conflict (NIAC) in the modern era. To this end, renowned international academics and legal advisers, both military and civilian, representing military, diplomatic, non-governmental and academic institutions from the global community, were invited to the War College to analyze a variety of legal topics related to NIAC. Specifically, the panelists undertook an examination of the types of NIACs and the law applicable to each; the legal statuses of actors in NIAC; means and methods of warfare in NIAC; recent and ongoing NIACs; detention in NIAC; and enforcement of international law in NIAC. In addition, the Honorable Harold H. Koh, Legal Adviser of the U.S. Department of State, presented a luncheon address at the Naval Station Newport Officers' Club on the second day of the conference.

The distinguished panelists were invited to contribute articles to this volume to further develop their thoughts offered at the conference, and this "Blue Book" is largely comprised of these articles. Readers and researchers will find within this volume a detailed study of the law pertaining to non-international armed conflicts as it is interpreted and applied in the post–September 11 world, and its effect on State actions, particularly military operations.

The conference and the "Blue Book" were made possible with generous support from the Naval War College Foundation, the *Israel Yearbook on Human Rights*, the International Institute of Humanitarian Law, and the Lieber Society on the Law of Armed Conflict, American Society of International Law.

On behalf of the Secretary of the Navy, the Chief of Naval Operations and the Commandant of the Marine Corps, I extend our thanks and gratitude to all the participants, contributing authors and editors for their invaluable contributions to this project and to the future understanding of the law applicable in non-international armed conflicts, the predominant form of warfare during the

last several decades and the type of conflicts in which military forces are most likely to be engaged in the twenty-first century.

JOHN N. CHRISTENSON
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Introduction

During the past half century, non-international armed conflicts have far outnumbered those that are international in character. Indeed, as the conference that provided the basis for this volume was underway, the United States was engaged with its NATO allies in a non-international armed conflict in Afghanistan and was winding down its long participation in one in Iraq. The nation was also "at war" with various transnational terrorist groups in what many characterize as non-international armed conflict.

Yet, the *lex scripta* governing international armed conflict dwarfs that addressing non-international armed conflict. Moreover, although international tribunals have handled many cases involving the latter, their decisions often prove controversial, especially when applying the law of international armed conflict to non-international conflicts. Unfortunately, even the academic community pays less attention to the law of non-international armed conflict than merited by its legal complexity and the frequency and human consequences of the conflicts to which it applies.

This reality is unsurprising. International armed conflict self-evidently affects international stability. As history has demonstrated time and again, the risks of escalation and of spread are high whenever such conflicts occur. These and other factors motivate the members of the international community to agree upon norms limiting the effects of State-on-State conflict lest they find themselves involved therein. In doing so, States not only accept limitations on their battlefield actions, but also secure protection for, *inter alia*, their civilians, civilian property and soldiers *hors de combat*. The key to the system is the reciprocity inherent in the treaty and customary law regimes that encompass opposing belligerents. Since the law of international armed conflict is more robust than its non-international counterpart, so too is the attention paid it.

Non-international armed conflict is of a fundamentally different nature. In most cases, States are facing organized groups of lawbreakers from whom reciprocity cannot be expected. Therefore, there is often little incentive for States to limit their scope of action by agreeing to legal norms with which only they will abide. Moreover, as the conflict is "internal," the risk of spread is limited, while the involvement of other States is a matter of their discretion.

However, the context in which non-international armed conflict occurs is undergoing transformation. Transnational terrorism has become a globally pervasive

phenomenon, one that the international community seems increasingly willing to classify as non-international, at least to the extent it rises to the level of "armed conflict" as a matter of law. Further, as illustrated by the conflicts in the Balkans, Afghanistan and the Great Lakes region of Africa, the likelihood of spillover into neighboring countries is very real, especially when a conflict is ethnically or religiously based or when adjacent territory is poorly governed. And the rise of criminal groups with capabilities equaling those of government forces, as in Colombia and Mexico, raises the question of whether the hostilities they engage in qualify as armed conflict.

The International Law Department of the Naval War College, long noted for exploring new legal challenges in its annual conferences, accordingly decided that a closer examination of the law governing non-international armed conflict was opportune. Held in June 2011, the resulting conference brought together many of the key legal practitioners and scholars in the field to consider both the state of the law and where it might be headed. Certain of the participants were invited to expand on their presentations in this volume, the eighty-eighth in the Naval War College's International Law Studies ("Blue Books") series. It delves into such complicated topics as the scope of non-international armed conflict, the legal status of actors, specific limitations on methods and means of warfare, detention and enforcement. The volume also offers several firsthand descriptions of particular non-international armed conflicts. Hopefully, the various contributions will assist those tasked with providing legal advice during future non-international armed conflicts, as well as make a measurable contribution to the scholarship on the subject.

Appreciation is owed to many who made the conference and this volume of the "Blue Books" possible. Rear Admiral John Christenson, President of the Naval War College, and Ambassador Mary Ann Peters, its Provost, provide the leadership that enables the International Law Department to undertake these cutting-edge studies. Professor Robert "Barney" Rubel, Dean of the Center for Naval Warfare Studies, consistently affords the International Law Department the material support necessary to engage in meaningful research, as well as the vision that undergirds all of its activities. Professor Dennis Mandsager, former Chairman of the International Law Department, was at the helm as the Department developed the topic and executed the conference. Lieutenant Colonel George Cadwalader ably served as Conference Director, an oft-thankless duty, but one that is the key to success. Finally, Brigadier General Kenneth Watkin, Canadian Forces (Ret.), the War College's 2011–12 Stockton Professor of International Law, and Captain Andrew Norris, U.S. Coast Guard, edited this important volume with substantive aplomb and editorial finesse. They are to be congratulated.

Introduction

The Naval War College has engaged in international law study and writing since the late nineteenth century. Indeed, the first volume of the "Blue Book" series was authored in 1901 by Professor John Bassett Moore, who would go on to serve as the first U.S. judge on the Permanent Court of International Justice. It is our commitment to continue this proud tradition in the years to come.

PROFESSOR MICHAEL N. SCHMITT
Chairman, International Law Department
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Preface

From June 21 to 23, 2011, the U.S. Naval War College hosted distinguished international scholars and practitioners, both military and civilian, representing government and academic institutions, to participate in a conference examining the evolving law in non-international armed conflict (NIAC) in the twenty-first century. Panelists discussed their views on how the law will develop as the world continues to struggle with the changing nature of the threats to national and international security posed by failed and failing States, insurgencies, and transnational criminal and terrorist organizations. The conference featured opening, luncheon and closing addresses, as well as six panel discussions.

The conference summary that follows was prepared by Commander Christian P. Fleming, JAGC, U.S. Navy, a member of the Navy Reserve unit that supports the Naval War College's International Law Department. The summary recapitulates the highlights of each conference speaker's presentation. As co-editors, we are deeply indebted to Commander Fleming for his attention to detail and assistance in facilitating the publication of this "Blue Book." We would also be remiss if we did not thank Captain Ralph Thomas, JAGC, U.S. Navy (Ret.), for his outstanding support and dedication in editing the submissions for this volume of the International Law Studies series. We also extend our sincere appreciation to Susan Meyer of the Naval War College's Desktop Publishing Division for expertly preparing the page proofs. Additionally, we would like to thank Albert Fassbender and Shannon Cole for their excellent work in proofreading the conference papers. The quality of this volume is a reflection of their professionalism and outstanding expertise.

This "Blue Book" would not have come to fruition had it not been for the enormously successful conference made possible in large measure by the conference committee under the leadership of Lieutenant Colonel George Cadwalader, U.S. Marine Corps, working with Mrs. Jayne Van Petten of the International Law Department, and the support provided by the Naval War College Foundation, the International Institute of Humanitarian Law, the Lieber Society on the Law of Armed Conflict (American Society of International Law) and the *Israel Yearbook on Human Rights*. We thank these individuals and organizations for their enduring support and generosity.

We hope that the thought-provoking articles published in this "Blue Book" will add to—and help shape—the debate on the multiple complex emerging legal issues presented by the changing character of war. The insights offered to legal

practitioners and scholars should assist them as they address these and other issues that may evolve in future conflicts.

Opening Address

Professor Ken Watkin delivered the opening address. After introductory remarks, Professor Watkin began his discussion of law in NIAC by quoting Colonel Caldwell, who in 1906 defined a form of NIAC known as "small wars" as being "campaigns undertaken to suppress rebellion and guerilla warfare in all parts of the world where organized armies are struggling against opponents who will not meet them in the open field." The 1940 Small Wars Manual of the U.S. Marine Corps indicated that "small wars represent the normal and frequent operations of the Marine Corps."

Because States have been hostile to clarifying the law, there has been limited success in articulating the law of NIAC. The concern is that non-State actors will be given legitimacy. Given the lack of consensus on what law applies to small war, a dialogue has been left open as to how and to what degree human rights law governs the use of force, the treatment of detainees and the accountability process in NIACs. Gaps remain and the law governing NIAC needs to be clarified for a number of reasons.

First, NIACs have been and will remain the dominant form of warfare. NIACs will not disappear and pure international wars are becoming rare. International armed conflicts (IACs) can change to NIACs overnight. This occurred in Afghanistan. Did troops on the ground notice the change? Did the legal advice change? As a result, for most practitioners the key question to be asked is whether there is an armed conflict rather than whether it is IAC or NIAC. Ironically, the Lieber Code, written during the American Civil War, a NIAC, was a starting point for codifying rules in an armed conflict. Unfortunately, the law applied in NIACs has become muddier since then.

Second, the lack of clarity regarding the law of NIAC can have a profound and sometimes negative effect not only on the victims of conflict, but also on States in terms of whether their actions are viewed as being legitimate. For example, in post-9/11 detainee operations, the dialogue would have been much different if there had been greater clarity in the law. An application of the policy of treating captured personnel under prisoner of war standards, without providing that status, or as security detainees under Geneva Convention IV could have been a practical, defensible and ultimately helpful approach. However, even today, an internationally agreed-upon framework governing detainees in NIAC is lacking.

Third, there is a belief that the law applicable to NIAC has no real relevance to conflicts between States. However, there can be significant cross-pollination of legal issues, such as when dealing with an insurgency during belligerent occupation.

Finally, the unwillingness of States to clarify what law applies to NIAC has negatively impacted their ability to influence how that law is being shaped. Gaps, both real and perceived, are being filled by restatements and manuals of international organizations instead of by States. One example is the International Committee of the Red Cross's 2009 *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, which deals with an issue that States appear to have been either unwilling or unable to address. The *Guidance* is representative of a trend suggesting that States should be held to a higher standard than their non-State opponents. Adding new inequity to the existing law is not likely to aid in reaching consensus among such significant stakeholders in international law as States.

At the same time, States cannot complain about new manuals if they do not get fully engaged in the processes being used to clarify the law. Civilians must be protected and the question is the degree to which States want to influence that process.

Panel I: Types of NIACs and Applicable Law

Panel I, moderated by Commander James Kraska, JAGC, U.S. Navy, of the Naval War College's International Law Department, consisted of Mr. David Graham of the U.S. Army's Judge Advocate General's Legal Center and School, Professor Geoffrey Corn of South Texas College of Law, Professor Charles Garraway of the Royal Institute of International Affairs (Chatham House) and Mr. Karl Chang of the U.S. Department of Defense Office of General Counsel.

Mr. Graham established the framework for the discussion by posing these questions: How do we recognize a NIAC? Are there different types of NIAC? How does the United States decide whether a NIAC exists or not? Mr. Graham commented that the law of armed conflict (LOAC) provides no definition of NIAC, nor does Common Article 3 of the Geneva Conventions of 1949. It is not clear what level of violence must exist and how protracted that violence needs to be for there to be a NIAC. States have been reluctant to recognize NIACs within their own borders for fear of legitimizing belligerent groups. Additional Protocol I to the 1949 Geneva Conventions does not aid in defining NIAC; Additional Protocol II (AP II) narrows the number of NIACs to which it would apply. The U.S. practice would appear to be that of making no official determination as to whether a NIAC exists, but, instead, to state that all U.S. personnel involved in a conflict will comply with LOAC, regardless of how such a conflict might be characterized. While perhaps self-serving, this is a practical approach with a proven track record.

Professor Corn focused on the issue of willful blindness in conflict determination and why this is a dangerous approach. When States invoke powers under LOAC—namely, to kill and detain—then States should be estopped from neglecting to provide protections under Common Article 3. Said differently, if a State is going to use the tools of war, then it must be bound by the rules of war. When a State enters an armed conflict, it cannot label it as a NIAC or IAC to game the system. Turning to the U.S. conflict against al Qaeda, Professor Corn believes the Bush administration attempted to use a gap in the law to justify an exception to Common Article 3. The United States attempted to use the inherent right of self-defense to justify the use of force, but pretended to not need to address *jus in bello* considerations. There was willful blindness to suggest that when invoking self-defense, the question of the legal framework governing the conflict did not have to be addressed.

Professor Garraway spoke from the European standpoint, and addressed the border between law enforcement and NIAC. Prior to 1949, there was either war or peace. In 1949, everything changed, and the spectrum of violence over the last fifty to sixty years has been like a rainbow, with difficulty in determining where the colors merge. The main issue for many years was the line between NIAC and IAC, but the underlying problem is determining the line between law enforcement and NIAC. Human rights law and LOAC are reasonably compatible insofar as "prohibitions" are concerned. The problem comes with the "permissions" inherent in "Hague law" on the conduct of hostilities. The challenge is that if human rights law and LOAC are not to collide, there need to be compromises where they differ, such as in targeting. There is a need to know what law applies in which circumstances. The answer might lie in the intensity of the violence. Where the intensity is similar to IAC, LOAC has priority; where the level is less, human rights law has priority.

Mr. Chang observed that people are troubled by a dearth of law pertaining to NIAC. He argued that attempts to fill this perceived void by drawing from human rights law or from law relating to IAC were unpersuasive and often an exercise in applying law to situations for which it was not intended. Instead, Mr. Chang proposed that the law of neutrality, which governs the relations between belligerents and neutrals, gave principled limits on transnational NIACs. In IAC, we know whom we are fighting and where we want to fight. But in transnational NIAC, the fighting often takes place in neutral or non-belligerent States against citizens of such States. The framework of neutrality law is needed to determine when persons have forfeited their neutral immunity and acquired enemy status. Similarly, neutrality law is needed to determine where the State may use force, i.e., when other States are unable or unwilling to address threats emanating from their territories.

Panel II: Legal Status of Actors in NIAC

The International Law Department's Commander Andrew Norris, U.S. Coast Guard, moderated this panel, which consisted of Durham University professor Michael Schmitt, Creighton University School of Law professor Sean Watts and Mr. Stephen Pomper of the U.S. Department of State. The panel delved into the legal status of actors in NIAC, focusing on the categorization of those fighting for and against the State. Mr. Pomper commented on various U.S. legal policy positions regarding NIAC.

Professor Schmitt discussed the law pertaining to opposition forces in NIAC, noting that treaty law directly on point is sparse. A threshold issue is determining whether the persons are actually members of the opposition or merely individual criminals or members of criminal gangs taking advantage of the instability that exists during conflict. The latter cannot be parties to the conflict unless they are acting in support of rebel forces, and operations conducted against them are governed by domestic and human rights law. Professor Schmitt cautioned, however, that there is a possible change in the wind for well-organized armed criminal gangs competing with the State for control and authority over territory when the State must resort to the military in response. As to opposition forces in a NIAC, the easiest case is that of dissident armed forces, which are clearly targetable at all times. Other groups must display some level of structure and coordination and engage in "armed" actions (or support thereof) against the State before attaining the status of an "organized armed group," that is, a party to the conflict and therefore subject to targeting as such. Individuals who act against the State without membership in an organized armed group may qualify as "direct participants in hostilities" depending on the nature of their activities. When they qualify, they become targetable for such time as they participate in the conflict. Professor Schmitt argued that if they engage in recurring acts of hostility, their targetability extends throughout the period of the acts.

Professor Watts addressed the status of government forces in NIAC, and clarified that "status" was being discussed in the classic sense as combatant status, i.e., one's exposure to hostilities and one's authority to engage in hostilities. Initially, Professor Watts observed that States have not turned to international law to define the status of government forces in NIAC. There is no customary international law in this area and very little by way of treatment in scholarly journals. States have not seen a need for international law to speak to the issue of government forces in NIAC, because they are committed to domestic law in this area and have generally been reluctant to commit NIAC issues to international law. Additionally, there is a lack of consensus among States as to the law applicable to NIAC. However, NIAC

law is changing. It is possible to imagine a future where some States—and perhaps tribunals—recognize rules regulating participation of government forces in NIAC. Although NIAC rules are often developed by analogy from rules of IAC, the more likely source for such a rule would be some derivation of the existing NIAC rule of distinction. Professor Watts suggested, however, that such a rule would be ineffective in addressing the traditional concerns of distinction. The real concern with government forces' participation in NIAC is their conduct rather than their legal status. Ultimately, this exercise requires a choice between conceiving of combatant status as a gateway to protections and obligations and conceiving of status in purely political terms. This forces a more theoretical consideration of *jus in bello* than usual.

Mr. Pomper noted that the rules governing actors in NIAC are less developed than in IAC. Often NIAC rules are drawn from their analogs in IAC and translated into the NIAC context, but this exercise can be difficult. There are identity and status issues at the center of this exercise. Parallels exist between NIAC and IAC, but it is difficult to categorize the actors in NIAC the same way we do in IAC. How this is defined has important implications for life and liberty, and has great operational significance for warfighters. There appears to be growing consensus among the United States and like-minded countries that there are two primary ways an individual becomes liable to attack in a NIAC. The first is if he is a member of an organized armed group; the second is if he is a civilian who directly participates in hostilities, whether or not a member of an organized armed group. An individual who is a member of an organized armed group can be attacked at any time. By contrast, a civilian who directly participates in hostilities loses protection only for the duration of the participation. There also appears to be growing support for the concept that to determine whether there is direct participation in hostilities, the nature of the harm, causation and a nexus to the hostilities must be considered.

Panel III: Means and Methods in NIAC

Lieutenant Colonel George Cadwalader Jr., U.S. Marine Corps, of the International Law Department, moderated this panel, which discussed means and methods in NIAC. The panel consisted of Air Commodore Bill Boothby of the Royal Air Force, Professor Dr. Wolff Heintschel von Heinegg of Europa-Universität Viadrina and Mr. Dick Jackson, the Special Assistant to the U.S. Army Judge Advocate General for Law of War Matters.

Air Commodore Boothby opened the panel by posing the question whether there is a meaningful distinction between the weapons laws that apply during IAC and NIAC. First examining the similarities, he noted that the fundamental

principles of superfluous injury/unnecessary suffering and the prohibition of weapons that are indiscriminate by nature apply equally in both types of conflict. AP II applies to both, as do the Chemical Weapons Convention, the Biological Weapons Convention, the Ottawa Convention and the Cluster Munitions Convention. However, there is an issue raised by expanding bullets. While treaty law bans the use of expanding bullets in IAC, it is questionable whether this is customary international law. The Kampala Review Conference for the Rome Statute of the International Criminal Court (ICC) added the offense of employing expanding bullets to those that could be committed in NIAC, but only if they are employed to "uselessly aggravate suffering." Thus, expanding bullets seem to represent a point of distinction between the laws applicable to IAC and NIAC. In the former, the offense is not tied to superfluous injury and unnecessary suffering; in the latter it is. While the general trend has been convergence in the weapons laws of these two classes of conflict, achieving complete convergence would require State action and adjustment of some legal interpretations.

Professor Dr. Heintschel von Heinegg focused on naval means of warfare in NIAC. Until the 1990s there were not many rules in NIAC related to means and methods. The emerging trend is to expand treaty law applicable to NIAC through the terms of the treaty itself, i.e., the treaty provisions state that it applies in NIACs. However, those treaties that do not distinguish between IACs and NIACs have not become customary international law. If there is a merger between the law in IAC and that in NIAC, then it cannot be a one-way street. The law cannot just speak about protections, but must also address privileges, such as targeting. There have been some historical examples of naval components to NIACs, such as during the Spanish Civil War, and the Sri Lanka, Algerian and, more recently, Libyan conflicts. There are no substantive rules of international law prohibiting naval means and methods in NIAC. Within the State's territory, government forces can interfere with international navigation. However, government forces cannot expand this principle to international waters. And, if non-State actors interfere with navigation, the State must provide notice to international shipping.

Mr. Jackson remarked that the trend has been a collapsing of IAC rules into NIAC, driven largely by the warfighter on the ground who does not know when the situation shifts from an IAC to a NIAC. He then discussed perfidy in NIAC. Perfidy violates the principle of distinction. The most important part of perfidy under NIAC is feigning of civilian status. The Military Commissions Act requires a showing of a violation of LOAC; perfidy may be charged as such a violation.

Panel IV: Recent and Ongoing NIACs

This panel, moderated by Naval War College professor Pete Pedrozo, was comprised of Lieutenant General Raymundo Ferrer of the Philippine Armed Forces, Colonel Juan Carlos Gomez of the Colombian Air Force and Captain Rob McLaughlin of the Royal Australian Navy. Its focus was on recent and ongoing NIACs.

General Ferrer focused on the two major insurgent groups in the Philippines: the Maoist group and the Moro group. The Maoist group, consisting of the Communist Party of the Philippines/New People's Army, operates nationwide and is the longest-running Maoist insurgency in the world. The Moro group operates primarily in the southern Philippines, and consists of three major groups: the Moro National Liberation Front, the Moro Islamic Liberation Front and the Abu Sayyaf Group. General Ferrer opined that the NIAC in the Philippines is a cry for human security.

Colonel Gomez discussed the forty-five years of internal conflict in Colombia. He stated there are three groups of illegal armed actors: the Revolutionary Armed Forces of Columbia (FARC), the National Liberation Army (ELN) and paramilitary forces that have become criminal gangs. Colonel Gomez described the difficulty in the new operational environment that consists of human rights law on one side and international humanitarian law on the other, with the government's effort to combat terrorism and organized crime operating, depending on the circumstances, under one or the other of these two norms. Essentially, human rights law provides the framework in territory controlled by the government and international humanitarian law applies where the organized armed groups control. The dichotomy is that under human rights law, where there is typical criminal violence, the use of force is governed by restrained law enforcement standards, including self-defense. Under international humanitarian law, where there is a high level of violence, the concepts of military necessity, military objective, distinction, humanity and proportionality apply. The nature and location of the operation determine whether government forces are operating under law enforcement–type rules of engagement (ROE) or the more robust ROE applicable to traditional military operations.

Captain McLaughlin analyzed Australia's experience in East Timor, which he described as a high-end law enforcement operation, and contrasted it with the Australian experience in Afghanistan, which was a NIAC. He stated that whether a conflict is classified as law enforcement, a NIAC or an IAC is important because under a law enforcement scenario, lethal force can be used for self-defense, but in NIAC and IAC, the LOAC principles govern the use of force. He opined that Afghanistan has clearly been a NIAC since 2005 and that there was little political or

strategic risk in classifying it as such, especially since the Taliban are seen to have few redeeming features. However, East Timor was, for political and strategic reasons as much as legal reasons, classified as a law enforcement action, in large part because the intervening force was invited in by Indonesia and shared responsibility for security with Indonesia. The decision on how to characterize a conflict impacts ROE, determining whether there are attack or only self-defense ROE in place with respect to lethal force. While self-defense ROE are the same under both labels, mission accomplishment ROE are where they differ. He indicated that there is little practical difference between NIAC and law enforcement insofar as detention rules are concerned.

Luncheon Address

The Honorable Harold Koh, Legal Adviser of the Department of State, presented a luncheon address entitled "International Law and Armed Conflict in the Obama Administration." Mr. Koh opined that there was an emerging Obama/Clinton doctrine that espoused four principles: (1) principled engagement, (2) diplomacy as an element of smart power, (3) strategic multilateralism and (4) compliance with the rules of domestic and international law.

Mr. Koh stated that the United States is deeply committed to applying all applicable law, including LOAC, in its non-international armed conflict with al Qaeda with respect to both targeting and detention. Under domestic law, the authority to detain stems from the Authorization for Use of Military Force (AUMF), as informed by the laws of war. Common Article 3 and Additional Protocol II to the Geneva Conventions, as well as the Supreme Court of the United States, all contemplate that parties may lawfully detain belligerents to prevent them from returning to the battlefield. Once detained, all persons in U.S. custody must be treated humanely, and the administration has taken a number of steps to ensure that detainees in U.S. custody are treated humanely in accordance with our domestic and international legal obligations. The United States has unequivocally affirmed that it will not engage in torture and has affirmed that current U.S. military practices are consistent with Additional Protocol II to the Geneva Conventions and with Article 75 of Additional Protocol I to the Geneva Conventions, including the rules within these instruments that parallel the International Covenant on Civil and Political Rights.

He further stated that the United States complies with all applicable law in its targeting practices. The United States is in an armed conflict with al Qaeda, the Taliban and associated forces, and may also use force consistent with the inherent right of self-defense. Congress has authorized force through the AUMF. Osama

bin Laden, the leader of al Qaeda, clearly had an ongoing operational role and his activities posed an imminent threat against the United States. There can be no question that he was the leader of an enemy force and a legitimate target in our armed conflict with al Qaeda. Moreover, the operation against him was conducted in a manner consistent with LOAC, including with the principles of distinction and proportionality, and in accordance with U.S. domestic law.

Turning to Libya, Mr. Koh stated that there was a call to international action by the Arab League and NATO, and the use of force to protect civilians was authorized by the UN Security Council under Chapter VII of the UN Charter because the situation within Libya threatened international peace and security. U.S. actions were consistent with the War Powers Resolution in these particular circumstances, specifically as follows: (1) the U.S. mission was limited in nature, duration and scope—with the shift to an explicit support role by the U.S. forces as part of a NATO-led multilateral civilian protection operation; (2) the exposure of U.S. forces was limited, involving no U.S. casualties or threat of significant U.S. casualties and no sustained fighting or active exchanges of fire with hostile forces; (3) the risk of escalation was limited, with no U.S. military forces on the ground; and (4) the military means used were limited, the ordnance dropped being a fraction of that used in Kosovo. Mr. Koh posed the question: Did Congress in 1973, when it enacted the War Powers Resolution as an attempt to prevent future Vietnam Wars, intend that it also interrupt a mission—limited in nature, duration and scope—launched to stop the slaughter of innocent civilians, as was the mission in Libya?

Mr. Koh concluded by remarking that the administration has tried to square its emerging national security policies with the need for interoperability with allies and coalition partners who are parties to the ICC and cluster munitions and landmines treaties.

Panel V: Detention in NIAC

This panel was moderated by Lieutenant Colonel Eric Young, JA, U.S. Army, of the International Law Department, and consisted of Brigadier General Thomas Ayres, JA, U.S. Army; Lieutenant Commander Kovit Talasophon of the Royal Thai Navy; Dr. Knut Dörmann, of the International Committee of the Red Cross; and Deputy Assistant Secretary of Defense; Rule of Law and Detainee Policy, William Lietzau.

General Ayres addressed the role of detainee operations in NIAC. He noted that legal authority existed to detain insurgents in a NIAC to keep them out of the fight until the cessation of hostilities. He noted, however, that based upon his experiences in Iraq, there are four types of insurgents: (1) those acting for a criminal

purpose, e.g., to steal; (2) those who oppose the presence of coalition forces and attempt to demonstrate to the civilian populace that the occupying force is incapable of keeping civilians safe; (3) those who oppose the government and seek to discredit it; and (4) foreign fighters who may be training to engage in terrorist activities and pose a threat to the national security interest of the United States or other coalition nations.

The first type of insurgent, those with a criminal purpose, would, in almost all phases of the conflict, be turned over to the government of Iraq to be tried in the domestic criminal courts. With regard to the remaining categories of insurgents, the coalition forces' objective was to detain only the worst of the worst, because, for operational reasons and due to "insurgent math," it was impossible to detain all potential "bad actors." The operational realities drove the coalition to evidence-based detention. Moreover, once the UN Security Council resolution providing authority for the presence of coalition forces in Iraq neared expiration, the coalition began transferring detainees to the Iraqi government. In preparation for that transfer, the coalition sought to assist in the maturation of the Iraqi government institutions in their implementation of the rule of law by increasingly complying with Iraqi law and respecting Iraq's criminal law as the basis for detaining insurgents. General Ayres asserted that the coalition's efforts in modeling adherence to a criminal law paradigm to detain insurgents should not be seen as undercutting the international humanitarian law basis for detaining insurgents in a NIAC.

Lieutenant Commander Talasophon reviewed Thailand's experience with detention in what he characterized as "almost a civil war" with communist groups during the Cold War and in border wars with its neighbors. He indicated that there are ongoing hostilities in the southern portions of Thailand between the government and those with political grievances. However, the Thai government has declared that these hostilities are not a NIAC; therefore, they are dealt with through law enforcement operations. Domestic law has been used instead of international humanitarian law, although the government has complied with the spirit of Common Article 3 in conducting the operations. Detention is used to secure evidence and to ensure that the actor does not engage in further violence.

Dr. Dörmann spoke on the legal framework of detention in NIAC. He began with a general observation that the sources of international law pertaining to detention in NIAC consisted of Common Article 3, Articles 4 through 6 of AP II and customary international law. Next, he opined that it is now generally accepted that human rights law applies alongside international humanitarian law in situations of armed conflict, including, despite the view of some important dissenters like the United States, extraterritorially. Dr. Dörmann discussed the rules on treatment in

detention, conditions of detention and fair trial rights, but focused his remarks on internment (i.e., non-criminal detention). He indicated that internment cannot be used solely for interrogation purposes; nor can it be used as punishment for past acts. Internment may be resorted to if there are imperative reasons for security to do so, a standard which includes direct participation in hostilities. He stated that the status of those detained should be periodically reviewed to determine whether they are still a security threat. Dr. Dörmann concluded by stating that there were gaps in the law of detention in NIAC and States should meet to discuss the legal framework to fill those gaps.

Mr. Lietzau observed that the United States used to not think about what law applied in NIAC, particularly with regard to those detained during the conflict. In fact, the United States' last experience with long-term detention was of prisoners of war captured during World War II. The law then was clear—enemy prisoners of war could be held until the end of the conflict. But twenty-first-century conflicts have changed. Now the war is not with another State, but with a non-State actor, al Qaeda. In the early period of this new type of war, the United States was accused of holding detainees indefinitely without providing a means of review to determine whether there was sufficient basis for the detention. Today, newly captured individuals are submitted to a Detainee Review Board. The Board, comprised of three field-grade military officers, reviews each individual's detention for both legality and necessity of continued detention. The detainee receives expert assistance from a U.S. officer who is authorized access to all reasonably available information pertaining to that detainee. This review is repeated periodically after the initial hearing, which must take place within sixty days of arrival at the internment facility. Now some argue that the pendulum has swung too far, and that the United States is releasing detainees (some of whom have returned to the fight) too quickly. What is unarguable is that an indefinite detention without some form of process in these new wars will not be stomached.

Panel VI: Enforcement in NIAC

Panel VI, on enforcement in NIAC, was moderated by Colonel Darren Stewart, OBE, British Army, the Director of the Military Department of the International Institute of Humanitarian Law at San Remo, Italy. The panelists were Professor John Cerone, professor of law and Director, Center for International Law & Policy, New England Law | Boston; University of Essex professor Françoise Hampson; and Johns Hopkins University professor Ruth Wedgwood.

Introducing the topic, Colonel Stewart remarked that there is little substantive black letter law applicable to NIAC when compared to the international

humanitarian law applicable to IAC. However, while the law in NIAC has gaps, it is applied day to day by practitioners on the ground. The question of enforcement brings the gaps in the law into sharp focus.

Professor Cerone discussed enforcement issues in the context of the then-current situation in Libya. After reviewing the phases of the conflict, he discussed the legal regimes that applied to each phase, as well as how they related to each other. He stated that it is now widely accepted that international human rights law applies simultaneously with humanitarian law in internal armed conflicts. Even those States that object to simultaneous application in international or transnational armed conflicts do not object to the application of international human rights law in internal armed conflicts. He then focused on international criminal law and the Security Council referral of the situation in Libya to the ICC. As Libya is not a party to the ICC Statute, the Court will need to address issues of immunity and *nullum crimen sine lege*. The Court will have to ensure, in particular, that any crimes prosecuted are well established in customary international law. Professor Cerone indicated that twenty years ago it was debatable whether any violations of NIAC law gave rise to individual criminal responsibility in international law. The legal landscape has changed dramatically since that time. Nonetheless, he concluded that it is clear that not all of the war crimes within the subject matter jurisdiction of the ICC have entered the corpus of customary law.

Professor Hampson opined that in the past fifteen years the focus has been on criminal responsibility, with not enough focus on civil responsibility. The advantages of a civil action are that the claim can be brought against a State without the need to identify the actual perpetrators, there is a lower standard of proof than in criminal cases and the victims have more control over the claims. Claims can be brought in the domestic courts of the State where the violation occurred and possibly in the domestic courts of third-party States. Professor Hampson indicated that there is no international means of bringing a claim against a non-State actor, although possibly arbitration could be used on an ad hoc basis. At the international level, the only way to proceed is to bring a claim against a State. Claims could be brought before the International Court of Justice or other human rights bodies. In fact, she stated, the most important feature of the human rights bodies is the right of an individual to file a petition with them.

Professor Wedgwood offered several suggestions for improving the work of the ad hoc war crimes tribunals. First, indictments should be structured to allow a speedy trial. The charges against Milosevic might have been tried in separate parts in Bosnia, Croatia and Kosovo, instead of the four-year trial in the International Criminal Tribunal for the former Yugoslavia (ICTY) during which both the presiding judge and the defendant passed away. Second, international justice should

not be segregated by tribunal; she observed that it is unfortunate the ICTY declined to share evidence from Serb military archives with the International Court of Justice in the latter's adjudication of the Srebrenica genocide case. Third, it is important that cases be tried against defendants from all ethnic communities in a civil conflict, so that there is no misplaced imputation of bias. The failure of the Rwanda tribunal to try any cases against members of the Rwandan Patriotic Front and the Tutsi armed forces, instead remitting them to local justice authorities controlled by the Kagame government, was an unfortunate event. Fourth, political organs are not well suited as the locus for war crimes investigations. In particular, the conducting of investigations of war crime allegations by the UN Secretary-General's office or the Human Rights Council may be problematic because of limited fact-finding capacity and their daily immersion in politics.

Closing Address

Professor Emeritus Yoram Dinstein of Tel Aviv University and the U.S. Naval War College's Stockton Professor of International Law during academic years 1999–2000 and 2002–3 delivered the closing address. Professor Dinstein addressed five main areas: the definition of NIAC, thresholds in armed conflicts, *jus in bello*, intervention and interaction.

Professor Dinstein defined a NIAC as a conflict taking place within the borders of a single State, carried out between the central government of that State and organized armed groups, or, there being no effective government, between organized armed groups fighting each other. A NIAC can spill over across the borders and start another NIAC in a second country, as happened in the Great Lakes region of Africa. Still, the idea (endorsed by the Supreme Court of the United States) that a NIAC can be global is oxymoronic.

Next, Professor Dinstein pointed out that there were three thresholds in armed conflicts: two for NIACs and one for IAC, plus a sublevel of sporadic and isolated violence (e.g., riots) that is below the first threshold, and thus law enforcement in nature. The first threshold of NIACs is established by Common Article 3 of the four Geneva Conventions of 1949. This famous provision (which reflects customary international law) does not spell out what conditions have to be met for the first threshold to be crossed. The Appeals Chamber of the ICTY, in the 1995 *Tadić* case added the element that the violence must be "protracted."

The second threshold of NIACs is set up by AP II of 1977, which requires the exercise of control by an organized armed group over a part of the territory, enabling it to carry out sustained and concerted military operations. Professor Dinstein indicated that this requirement makes the distinction between a NIAC

and forms of conflict not amounting to a NIAC much clearer: sustained and concerted military operations are the antonym of sporadic and isolated violence. The acid test of control of some territory explains the difference, for instance, between the then-current internal situations in Libya and Syria. In Libya (not counting the foreign intervention by fiat of the Security Council), there was no doubt a NIAC inasmuch as the insurgents exercised control over vast tracts of land. By contrast, the violence in Syria remained below the threshold—notwithstanding its great intensity and the fact that it was protracted—because no part of the territory was under the control of any insurgent organized armed group.

The third threshold means that the armed conflict amounts to an IAC, and this denotes that two or more States are pitted against each other.

Professor Dinstein then focused on the *jus in bello* in NIAC, noting that while there is a very remarkable trend in treaty law of growing convergence between the *jus in bello* applicable in IACs and that in NIAC, there cannot be a full merger of the law in the two types of armed conflict. He indicated that there are at least three insurmountable obstacles to such merger: (a) the domestic law will always consider insurgents to be traitors and therefore they cannot be accorded the status of prisoners of war by the government of the State (absent recognition of belligerency); (b) neutrality is not an issue, as there is only one State embroiled in a NIAC; and (c) the whole body of law relating to belligerent occupation is irrelevant to NIACs since neither the government nor the insurgents can be in belligerent occupation of their own land. There are additional, less compelling problems relating to the legality of certain means and methods of warfare, e.g., the legality of particular weapons and blockades.

The issue of intervention relates to military assistance requested from, or offered by, a foreign country when a NIAC is going on. International law permits foreign countries to extend military assistance to the State combating insurgents. If and when the foreign country does so, the armed conflict remains a NIAC, despite the participation of foreign troops in the hostilities, inasmuch as the foreign troops are not battling another State. However, if the foreign troops are deployed against the government, the armed conflict automatically crosses the third threshold and becomes an IAC. Moreover, even when the foreign troops arrive at the request of the government, consent to their presence can be withdrawn at any time. Once consent is withdrawn by the government, the foreign forces must leave. Failure to do so will result in the situation becoming an IAC.

The last issue Professor Dinstein addressed is interaction. He first indicated that it must be appreciated that an armed conflict can coexist with the law enforcement paradigm. Criminal activities do not cease when an armed conflict (either a NIAC or an IAC) breaks out. Indeed, usually crime rises in wartime, if only because there

are numerous new crimes (such as black market activities or trading with the enemy). Ordinary crimes, even in the course of an armed conflict, are governed not by the *jus in bello* but by domestic criminal law, subject to the precepts of international human rights. Second, a NIAC can segue into an IAC; foreign intervention on behalf of insurgents is a prime example. But an IAC can also be the outcome of the implosion of a State torn apart by a NIAC and the continuation of the hostilities between several new sovereign States created on its ruins. Obviously, as far as fighters in the field are concerned, it may not always be easy to detect at what exact point a NIAC has morphed into an IAC (the situation in Bosnia in 1992 showed that lack of clarity in a graphic manner). It is therefore easier to analyze the situation when there has been an intervening period of time; for instance, Eritrea first rebelled successfully against Ethiopia in a NIAC, and then, several years later, started an IAC against the same country. Third, the reverse is also true: IACs can turn into NIACs. Thus, the IAC between the American-led coalition and the Baathist regime in Iraq came to a successful end, and the fighting that continues in Iraq is today no more than a NIAC. Fourth, a NIAC and an IAC can be waged concurrently in the same country. The best illustration is Afghanistan in 2001, where there was a NIAC between the Taliban and the Northern Alliance, and (starting in October of that year) a separate IAC between the United States (supported by its allies) and the Taliban. Fifth, as indicated by General Ferrer with respect to the Philippines, there may even be several unrelated NIACs going on in the same country simultaneously, where different organized armed groups fight the same central government while having diverse—and perhaps clashing—aims. All this can cause confusion, especially since governments are often "in denial," reversing the thresholds. That is to say, when governments are engaged in an IAC, they tend to claim that the armed conflict is no more than a NIAC. When they are caught in a NIAC, they are inclined to maintain that the violence is sporadic and below the NIAC threshold.

Professor Dinstein concluded by recognizing that times are changing and that NIAC law must change with them.

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